

Resolution No.: 17-23
Introduced: January 18, 2011
Adopted: January 18, 2011

**COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND
SITTING AS THE DISTRICT COUNCIL FOR THAT PORTION
OF THE MARYLAND-WASHINGTON REGIONAL DISTRICT
IN MONTGOMERY COUNTY**

By: District Council

SUBJECT: APPLICATION NO. G-868 FOR AMENDMENT TO THE ZONING
ORDINANCE MAP, Maryland-National Capital Park and Planning
Commission, OPINION AND RESOLUTION ON APPLICATION.
Tax Account Nos. 06-400001, 06-402408, and 06-402272

OPINION

Local Map Amendment (LMA) Application No. G-868, filed on June 27, 2010, by Applicant Maryland-National Capital Park and Planning Commission (M-NCPPC), requests reclassification from the C-4 Zone (Limited Commercial) to the C-1 Zone (Convenience Commercial) of property known as Parcels P160 and P113 and Part of Parcel 400 on Tax Map FR32, located at 14119 Travilah Road and 14000 Piney Meeting House Road, Rockville, Maryland. The subject site is in the Potomac Subregion, and consists of approximately 3.54 acres in the 6th Election District. The eastern (corner) property (Parcel P113 and Part of Parcel 400) contains approximately 1.55 acres, and is owned by Bardon, Inc. (Tax Account Numbers 06-402408 and 06-402272), and the western parcel (Parcel P160) contains approximately 1.99 acres, and is owned by Travillah-WHM, Limited Partnership (Tax Account Number 06-400001). Exhibits 9(a) and (b) and Exhibit 10. The owners support the application and there is no opposition. Exhibits 23 and 38; Tr. 16-19.

This case is somewhat unusual because it is not seeking reclassification to a floating zone, as has become more common in recent times.¹ Rather, it seeks to reclassify from one Euclidean Zone (C-4) to another Euclidean Zone (C-1), based on asserted mistakes in the Local Map Amendment (LMA) G-653 that initially rezoned the property into the C-4 Zone, and in the

¹ Zoning involves two basic types of classifications, Euclidean zones and floating zones. A floating zone is a flexible device that allows a legislative body to establish a district for a particular type of use, with land use regulations specific to that use, without attaching that district to particular pieces of property. The term "Euclidean" zoning arose from the seminal United States Supreme Court case upholding the land use authority of local governments, *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). Euclidean zoning divides the territory of a local jurisdiction into zoning districts with set boundaries and specific regulations governing aspects of land development such as permitted uses, lot sizes, setbacks, and building height.

comprehensive rezoning confirming that Zone in Sectional Map Amendment (SMA) G-800. The mistake is that neither of the roadways on which the site has frontage, Travilah Road and Piney Meetinghouse Road, is a major or arterial highway, and the C-4 Zone requires 100 feet of frontage on a major or arterial highway for a building permit to issue. *Zoning Ordinance §59-C-4.375*.

In the State of Maryland, an Applicant seeking to reclassify property from one Euclidean zone to another bears a heavy burden to prove either a substantial change in the zoning neighborhood or a mistake in the original zoning or comprehensive rezoning. *See Stratakis v. Beauchamp*, 268 Md. 643, 652-53, 304 A.2d 244, 249 (1973). This doctrine is known as the “change/mistake” rule. Because the Applicant is seeking reclassification to a Euclidean Zone on the subject site, based on an asserted error in a prior local map amendment and in the comprehensive zoning, this case is analyzed under the change/mistake formula.

If the Applicant succeeds in demonstrating change or mistake, the District Council is permitted, but not required, to grant the proposed rezoning. The Applicant must also demonstrate that the requested rezoning is warranted. *White v. Spring*, 109 Md. App. 692, 708-709, 675 A.2d 1023, 1030-1031, *cert den’d*, 684 A.2d 455 (1996).

The application filed in the present case seeks rezoning based on mistake. Thus, the first question presented is whether the District Council committed a “mistake,” as that term is used in zoning law, when it adopted LMA G-653 and the SMA that left the subject property zoned C-4. In *Boyce v. Sembly*, 25 Md. App. 43, 50-51, 334 A.2d 137, 142 (1975), the court defined the term “mistake.”

[E]rror or mistake is established when there is probative evidence to show that the . . . premises relied upon by the Council . . . were invalid. Error can be established by showing that . . . the Council failed to take into account then existing facts or projects or trends which were reasonably foreseeable of fruition in the future, so that the Council's action was premised initially on a misapprehension.²

This same test has been relied on in the subsequent case law. *See, e.g., Howard County v. Dorsey*, 292 Md. 351, 356-57, 438 A.2d 1339 (1982); *People's Counsel for Baltimore County v. Beachwood I Ltd. Partnership*, 107 Md. App. 627, 645, 670 A.2d 484, 493 (1995); and *White, supra*, 109 Md. App. 698.

In *Beachwood*, 107 Md. App. at 645, the court further clarified the concept: The finding of a mistake or error is not so much concerned with the logical validity or merit of ultimate conclusion-drawing as it is with the adequacy and accuracy of the factual premises that underlie the conclusion-drawing. A conclusion based on a factual predicate that is incomplete or inaccurate may be deemed, in zoning law, a mistake or error; an allegedly aberrant conclusion

² The court also notes that a mistake may also be established by showing that events occurring subsequent to the comprehensive zoning have proven that the Council's initial premises were incorrect.

based on full and accurate information, by contrast, is simply a case of bad judgment, which is immunized from second-guessing.

Thus, mistake is *not* demonstrated by evidence that a zoning authority used bad judgment. The change-mistake doctrine is designed to allow mistakes to be corrected, not to provide individual property owners with the means to second-guess comprehensive zoning decisions.³ A rezoning request can be granted based on mistake if strong evidence of error makes the question of mistake fairly debatable, *Dorsey*, 292 Md. at 356, and the requested rezoning is shown to be warranted. *White*, 109 Md. App. at 708-709.

This zoning application was initiated by the Technical Staff of the Maryland-National Capital Park and Planning Commission (M-NCPPC) who, in a report dated July 9, 2007, recommended approval of the subject rezoning request (Item "A" in the Staff report), as well as other corrective map amendments and local map amendments needed to correct other zoning errors (Exhibit 13). The Planning Board considered the application on July 26, 2007, and voted unanimously to recommend approval for the reasons set forth in the Technical Staff Report. Technical Staff reported these facts to the Hearing Examiner in a letter dated May 3, 2010 (Exhibit 15), and a hearing was scheduled for September 20, 2010. The Planning Board confirmed its support in a letter to the Hearing Examiner dated September 17, 2010 (Exhibit 21).

The public hearing proceeded, as scheduled, on September 20, 2010, and the record ultimately closed on December 21, 2010. The Hearing Examiner filed his report on December 22, 2010, and recommended approval of the application on the basis that the Applicant met its burden of demonstrating a mistake in the local map amendment and comprehensive zoning, which should be remedied by rezoning the subject site to the C-1 Zone. To avoid unnecessary detail in this Resolution, the Hearing Examiner's Report and Recommendation, dated December 22, 2010, is incorporated herein by reference.

The subject property consists of two tracts located just southwest of the intersection of Travilah Road and Piney Meeting House Road, in Rockville, Maryland. The eastern (corner) property (Parcel P113 and Part of Parcel 400) contains approximately 1.55 acres, and is owned by Bardon, Inc; the western parcel (Parcel P160), which fronts on Travilah Road, contains approximately 1.99 acres, and is owned by Travillah-WHM, Limited Partnership. The eastern tract is undeveloped, while the western tract contains four structures, one of which is a one-story retail structure currently occupied by a dry-cleaners. Tr. 26. The other structures consist of two residential style frame buildings and one storage facility.

The surrounding area was defined by the District Council in LMA G-653 as bounded on the north by Route 28, on the east by Glen Mill Road, and on the south and west by the Pepco right-of-way. Although the affected area is likely much smaller than this defined area, it is sensible to keep the same defined area in this case for consistency.

³ Maryland's highest court "has repeatedly recognized that there is a strong presumption of the correctness of comprehensive rezoning, and that 'strong evidence' of error is required to overcome that presumption." *Dorsey*, 292 Md. at 355; See also, *Beachwood*, 107 Md. App. at 641; and *Boyce*, 25 Md. App. at 49.

In Resolution 11-2044 granting LMA G-653, the District Council characterized the neighborhood as suburban, with an expanded road network (page 2 of the resolution). Exhibit 22. The April 23, 1990, Hearing Examiner's report commented that the "Travilah Quarry," a long-standing industrial use, was located immediately south of the subject site,⁴ but the zoning neighborhood, by that time, was characterized by extensive residential development and roads (1990 report, p. 7). Exhibit 22. The zoning around the subject site, except for the quarry to its south, is largely residential, R-200/TDR and PD-3. Moreover, the area around the subject site is currently dominated by residential development, except for the quarry to the immediate south-southwest of the site.

The surrounding area, as it presently exists, was described by Callum Murray of Technical Staff at the hearing. In addition to the 330 acre quarry to the south of the site, there are townhouses to the east of Piney Meetinghouse Road and single family houses at a density of three per acre to the north, the west, and the northeast. In his opinion, a small area of convenience shopping in the C-1 zone is entirely compatible with both types of use. Tr. 27-28.

The subject site had the following zoning history, as compiled by Technical Staff (Exhibit 25, pp. 1-2):

The subject property received split zoning in 1958 when comprehensive zoning applied the C-1 Zone to approximately 2.76 acres and half-acre residential density to the remainder. . . .

In 1980, new comprehensive zoning was applied to the site which confirmed the C-1 Zone and applied the I-2 Zone for the remainder except for those portions of the site lying within the road right-of-way which were retained in the residential zoning classification. . .

On July 7, 1986, the District Council adopted Ordinance 10-75, which . . . effectively rezoned about 22,000 square feet of the site from residential to commercial and industrial zoning.

On May 29, 1990, the County Council . . . approved the following resolution (No. 11-2044):

"Application No. G-653 for the reclassification from the C-1 and I-2 Zones to the C-4 Zone of 3.77596 acres known as parcels 160 and 113, located at 14119 Travilah Road and 14000 Piney Meeting House Road, Rockville, in the 6th Election District, is granted for the C-4 Zone in the amount requested."

On October 15, 2002, the District Council adopted Resolution No. 14-1468 approving Sectional Map Amendment G-800. . . . SMA G-800 was the first comprehensive

⁴ It is noteworthy that the quarry was operated at the time by Rockville Crushed Stone, Inc., which now is Bardon, Inc., the owner of the eastern half of the subject site.

zoning in the Subregion for 22 years, rezoning approximately 890 acres and confirming approximately 39,963 acres with existing zoning, including the subject property.

We now examine whether the record in this case meets the criteria for rezoning under the “change/mistake” rule. The first question is whether a “mistake” was made, as that term is defined in the case law discussed above. A “mistake” in this context is not an error of judgment by the Council, but rather a showing that “the . . . premises relied upon by the Council . . . were invalid . . . [;] that . . . the Council failed to take into account then existing facts . . . so that the Council's action was premised initially on a misapprehension.” *Boyce, 25 Md. App. at 50-51*.

The instant rezoning application is based on a mistake that was made twice, once in LMA G-653, which rezoned the site to C-4 in 1990 (Tr. 11-13), and once in SMA G-800, a comprehensive zoning measure which reconfirmed the zoning on the site in 2002, as a tiny part of 39,693 acres that were not recommended for rezoning in the sectional map amendment. Tr. 32-33. The comprehensive zoning in SMA G-800 had been intended to implement recommendations in the *Potomac Subregion Master Plan*, approved and adopted April 2002. Exhibits 39 and 40.

The mistake is that the property in question was placed in the C-4 Zone in LMA G-653 and then left in the existing C-4 Zone in SMA G-800, even though that Zone renders the land almost unusable and certainly incapable of being developed. This situation results from the fact that Zoning Ordinance §59-C-4.375 provides that “*No building permits shall be issued for new construction in the C-4 zone except on lots having a minimum frontage of 100 feet on an arterial or major road,*” and neither of the roadways on which the site has frontage, Travilah Road and Piney Meetinghouse Road, is an arterial or major road, as defined in County Code Sec. 49-31 and the applicable Master Plan. The Approved and Adopted Potomac Subregion Master Plan classifies Travilah Road and this section of Piney Meetinghouse Road as Primary Residential Streets with a minimum right-of-way of 70 feet. Arterials in the Master Plan have a minimum right-of-way of 80 – 120 feet and Major Highways a minimum of 120-150 feet. Exhibit 25, pp. 2-3 and Tr. 11-14.

As stated by Mr. Murray in his Staff Report of July 9, 2007 (Exhibit 13, p. 3):

The hearing examiner recommended approval of the application . . . Both the technical staff and the Planning Board acknowledged that the requested zoning was desirable and would satisfy planning objectives by providing commercial uses accessible to residential neighborhoods. The surrounding community, represented by the North Potomac Citizens Association, supported the reclassification and indicated a need for it.

For all the above reasons, the application was granted seventeen years ago. Unfortunately, the applicants, the technical staff, the Planning Board, the hearing examiner and the District Council all inadvertently missed a requirement of the C-4 Zone that stipulated that any new construction would require 100 feet of frontage on a major or arterial highway. Both Travilah Road and Piney Meeting House Road

between Travilah Road and Shady Grove Road Extended are classified as primary residential streets and have never been proposed as major or arterial highways. The classification applied for and granted was therefore a mistake. The original application had proposed an alternative consolidation of both properties (C-1 and I-2) to the C-1 Zone. On reading the record of the case, this alternative classification would likely have been granted, had the applicant or reviewers noted the requirement regarding C-4 frontage.

Once the mistake was made in LMA G-653, its reconfirmation in SMA G-800 was routine, in the absence of anyone noticing the mistake at the time. In fact, it was not discovered until the owner of the eastern portion of the site considered getting a building permit. As testified to by the owner's agent, Richard Freedman), the error was discovered about five years ago when his company contemplated constructing a sales facility on the site. His engineers then informed him,

. . . that in order to do anything in the C-4 zone, you had to have 100-foot of frontage on a major or arterial road, and neither Travilah nor Piney Meetinghouse, and the property sits on the corner, is a major or arterial road. Therefore the C-4 zone, we learned, was totally unusable at that location. And so we had unusable property. Tr. 16-17.

In this case, all the evidence confirms that no one caught the error in LMA G-653 and SMA G-800 until after it was approved by the Council in Resolution No. 14-1468, on October 15, 2002. This is not surprising, since the subject site was only one small portion of a very large area reviewed for the revised Master Plan and the comprehensive zoning. In this process, 40,583 acres were reviewed for SMA G-800, and approximately 890 acres were rezoned. Technical Staff report of July 1, 2002, for SMA G-800 (Exhibit 40, p. 1). The subject site consists of under four acres and therefore was not the main focus of attention.

In sum, the evidence demonstrates that there was an invalid factual premise regarding the propriety of retaining the C-4 Zone at this site and that the Council relied upon it in adopting LMA G-653 and that portion of SMA G-800 which applied to the subject site. Thus, the mistake and reliance criteria have been established, and the alleged mistake clearly falls within the courts' definition of that concept. The Council here indisputably relied upon recommendations of the Technical Staff, the Planning Board and the former Hearing Examiner, all of whom failed to notice (and therefore failed to mention to the Council) that the subject site did not have frontage on an arterial or major road, thereby precluding a building permit in the C-4 Zone. *Zoning Ordinance §59-C-4.375.*

However, as noted above, even though the evidence establishes that a mistake was made and relied upon, a decision to grant the rezoning requested in this application is permitted, not required. The District Council has the responsibility to consider whether the requested rezoning would be warranted (*i.e.*, that it would be the appropriate remedy for the mistake and would serve the public interest). *See White*, 109 Md. App. at 708-709.

The District Council's intent in LMA G-653 was stated in Resolution 11-2044 (Exhibit 22, p. 3.) – “[to] satisfy good planning objectives by providing commercial uses that are accessible to residential neighborhoods.” That intent was clearly frustrated by providing the site with a commercial zone (C-4), the terms of which must necessarily result in no commercial development on the site. Because nobody had noticed the mistake prior to the comprehensive rezoning of the area in SMA G-800, the error was compounded by confirming the site's C-4 Zoning, *sub silentio*, as part of the 39,693 acres which were not recommended for a zoning change.

The proposed rezoning to the C-1 Zone would carry out the intent of the Council in its local map amendment for the site, G-653, by “by providing commercial uses that are accessible to residential neighborhoods.” Exhibit 22, p. 3. As noted by Mr. Murray, the C-4 Zone actually frustrates the purpose of the commercial zoning, whereas the proposed C-1 Zone would fulfill it. Tr. 24.

The C-1 Zone is appropriate because this site will satisfy the purpose clause of the zone, as well as its regulations, and will be compatible with surrounding development.

The Purpose Clause of the C-1 Zone is contained in Zoning Ordinance §59-C-4.340:

It is the purpose of the C-1 zone to provide locations for convenience shopping facilities in which are found retail commercial uses which have a neighborhood orientation and which supply necessities usually requiring frequent purchasing with a minimum of consumer travel. Such facilities should be located so that their frequency and distributional pattern reflect their neighborhood orientation. In addition, such facilities should not be so large or so broad in scope of services as to attract substantial amounts of trade from outside the neighborhood. It is further the intent of this zone that, in order to restrict the size of such facilities, the convenience commercial zone should not be located in close proximity to other commercial areas; and it shall not be applied to land which is located within a central business district as defined in section 59-A-2.1.

Mr. Murray testified that the proposed C-1 Zone would comport with the zone's purpose; it would be compatible with existing and planned land uses in the surrounding area; and it would be in the public interest. Tr. 14, 22-28.

Mr. Murray opined that the C-1 zone is appropriate for the site because it provides locations for convenience shopping facilities which are of a neighborhood orientation and which supply necessities usually requiring frequent purchasing. The C-1 zoned area would also be sufficiently limited in its size (under four acres) that it would not permit commercial facilities large enough to attract substantial amounts of trade from outside the neighborhood. Tr. 22.

The purpose clause for the C-1 zone (Zoning Ordinance of 59-C-4.340) provides that the intent of the zone is that convenience commercial should not be located in close proximity to other commercial areas. Mr. Murray noted that the nearest commercial area is on Maryland

Route 28, approximately 5,000 feet, or almost one mile distant. He added that there is very limited commercial zoning within the Potomac Subregion. Tr. 22.

Mr. Murray further testified that (Tr. 27-28),

. . . there's been commercial zoning of some kind on the property for 52 years. . . . there's townhouses to the east of Piney Meetinghouse Road, and single family houses at a density of three per acre to the north, the west, and the northeast; a small area of convenience shopping in the C-1 zone is entirely compatible with both types of use. [Emphasis added.]

The area requirements of the C-1 Zone, set forth in Zoning Ordinance §59-C-4.341, would be met by the proposed rezoning since the site is less than 15 acres. According to Mr. Murray, the proposed rezoning also would have no adverse impact on public facilities. As stated by Mr. Murray (Tr. 14):

There will be no adverse impact on public facilities, schools, transportation, or utilities. In fact, convenience commercial trips by local citizens may be minimized.

Although the uses permitted in the C-1 and C-4 zones are similar, demands on public facilities may be reduced in that the theoretical commercial density in the C-1 Zone is less than that usually generated in the existing C-4 Zone. Exhibit 15, p. 3.

Mr. Murray's testimony was supported by both property owners. Tr. 16-19 and Exhibit 38.

Maryland law requires that any rezoning be in the public interest. As stated in the State Zoning Enabling Act applicable to Montgomery County, all zoning power must be exercised:

" . . . with the purposes of guiding and accomplishing a coordinated, comprehensive, adjusted, and systematic development of the regional district, . . . and [for] the protection and promotion of the health, safety, morals, comfort, and welfare of the inhabitants of the regional district." [*Regional District Act*, Maryland-National Capital Park and Planning Commission Article (Art. 28), Md. Code Ann., § 7-110].

Factors which may be considered in determining the public interest include Master Plan conformity, the recommendations of the Planning Board and its staff, possible adverse effects on the surrounding area or public facilities and potential public benefits.

As stated by Callum Murray on behalf of the Maryland-National Capital Park and Planning Commission, "The Master Plan that applies is the Potomac Subregion Master Plan, and unfortunately, at the time the zoning for the 66 square miles of Potomac was reviewed, there was no specific review of this property." Tr. 31. Mr. Murray noted that because the problem with the C-4 Zone was not noticed by Technical Staff, the Master Plan did not recommend a change in the zoning for the subject site. Mr. Murray went on to say (Tr. 32):

But I should say that we should really, looking back on it, we should have scrutinized it, and realized that it was inappropriate at that site. We just did not focus on this particular zoning.

Because they had overlooked the earlier error, both Technical Staff and the Planning Board did more than just recommend approval of this rezoning application; they brought the application themselves.

It should be noted that strict consistency with Master Plan is usually not required. *Mayor and Council of Rockville v. Rylyns Enterprises, Inc.*, 372 Md. 514, 530, 814 A.2d 469, 478 (2002), citing *Richmarr v. American PCS*, 117 Md. App. 607, 635-51, 701 A.2d 879, 893-901 (1997). As is evident from Mr. Murray's testimony, it was never the intent of the Master Plan framers to render the subject site unusable for commercial development. In fact, the opposite was intended. The C-4 Zone was not challenged in the Master Plan because of an oversight by the planners.

The testimony of Callum Murray of Technical Staff also establishes that the C-1 zone would be compatible with the surrounding area and would not strain public facilities. Tr. 14. In fact, encouraging convenience retail on the site may reduce the number of trips by making retail available to local residents who will not have to travel out to other areas to shop.

Finally, rezoning the site to the C-1 Zone would result in a benefit not only to the property owners, but also to the local residents by providing the opportunity for nearby convenience commercial, and also to the County, by allowing a significant increase in the property assessment of the subject site for tax purposes. The owner of the eastern half of the site successfully appealed the tax assessment of the property, knowing that it was unusable in its current zone, and the assessed property value was reduced from several hundred thousand dollars to \$5,000. The owner also had the property appraised for his own informational purposes in 2007, and its appraised value in the proper zone (*i.e.*, C-1 Zone), was \$3.5 million. Tr. 18-19. Thus, granting this rezoning will provide the public benefit of potentially increased tax revenues. There is no evidence of any negative impacts from the proposed rezoning.

Based on the foregoing analysis and the Hearing Examiner's report, which is incorporated herein, and after a thorough review of the entire record, the District Council concludes that a mistake was made when the Council rezoned the subject site to the C-4 Zone in LMA G-653 and when it approved that portion of SMA G-800 which left the subject site in the C-4 Zone; that the Council's underlying intent in LMA G-653 was "[to] satisfy good planning objectives by providing commercial uses that are accessible to residential neighborhoods;"⁵ that the C-4 Zone was actually inconsistent with that goal because restrictions in the Zone would prevent a building permit from being issued;⁶ that contrary to the Council's general intent, it inadvertently allowed the C-4 Zone to remain on the subject site in SMA G-800 because, at the time of the Sectional Map Amendment, neither the property owners nor the supporting agencies reporting to the Council (*i.e.*, Technical Staff, the Planning Board, the former Hearing Examiner

⁵ Resolution 11-2044 (Exhibit 22, p. 3).

⁶ Zoning Ordinance §59-C-4.375.

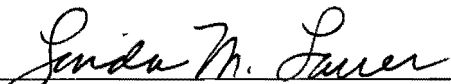
and Council Staff) brought the issue to the Council's attention; that the appropriate remedy would be to grant the instant application reclassifying the site to the C-1 Zone; that the C-1 zone would carry out the Council's original intent in LMA G-653 and SMA G-800 by providing convenience commercial facilities for the benefit of the local residents; that the requested rezoning would satisfy the purpose and regulations of the C-1 Zone; that the C-1 Zone would be compatible with the surrounding area; and that the requested reclassification to the C-1 Zone bears sufficient relationship to the public interest to justify its approval. For these reasons and because approval of the instant zoning application will aid in the accomplishment of a coordinated, comprehensive, adjusted, and systematic development of the Maryland-Washington Regional District, the application will be approved in the manner set forth below.

Action

The County Council for Montgomery County, Maryland, sitting as the District Council for that portion of the Maryland-Washington Regional District located in Montgomery County, Maryland approves the following resolution:

Zoning Application No. G-868, requesting reclassification from the C-4 Zone to the C-1 Zone of 3.54 acres of property known as Parcels P160 and P113, and Part of Parcel 400 on Tax Map FR32, and located at 14119 Travilah Road and 14000 Piney Meeting House Road, Rockville, Maryland, is hereby approved in the amount requested, in order to correct a mistake made in Local Map Amendment G-653 and Sectional Map Amendment G-800.

This is a correct copy of Council action.



Linda M. Lauer, Clerk of the Council